STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Mark C. Matheny, P 53471,

Respondent/Appellant

Case No. 04-155-GA

Decided: September 30, 2005

Appearances:

Wendy A. Neeley, for the Attorney Grievance Commission.
James J. Zimmer, for respondent.

BOARD OPINION

Genesee County Hearing Panel #3 ordered the suspension of respondent's license to practice law for 30 months for admitted misconduct which included commingling client funds with his own; intentional misappropriation of over $55,000, and misrepresentations to opposing counsel. The Grievance Administrator filed a "Conditional Petition for Review" seeking increased discipline but withdrew the petition when the decision to seek review was not ratified by the Attorney Grievance Commission. Respondent filed a timely petition for review seeking a reduction in the level of discipline on the grounds that his conduct could be characterized as negligent rather than willful and on the grounds that the hearing panel did not give sufficient consideration to certain mitigating factors. For the reasons discussed below, we conclude that discipline less than a revocation of respondent's license cannot be justified under a proper application of the American Bar Associations Standards for Imposing Lawyer Sanctions. We therefore exercise our authority under MCR 9.118(D) to nullify an order of a hearing panel and order other discipline by vacating the hearing panel order of suspension and ordering the revocation of respondent's license to practice law.

Panel Proceedings

The Grievance Administrator filed a three-count formal complaint in this case on November 30, 2004. The charges in the complaint arise from respondent's representation of Patricia Natzel who had previously filed a complaint in Genesee County Circuit Court against her former employer and supervisor. Respondent Matheny did not represent Ms. Natzel in that case. In that civil proceeding, Ms. Natzel rejected a mediation award and, as a result, was the subject of substantial mediation sanctions when the jury in her case returned a no cause verdict. In March 2001, an order was entered directing Ms. Natzel to pay mediation sanctions and taxable costs totaling $55,360.35. Ms. Natzel had retained respondent several weeks earlier for the purpose, apparently, of assisting Ms. Natzel in negotiating with the defendants' counsel to settle the sanctions award for a lower amount and/or to commence bankruptcy proceedings on her behalf.

On May 21, 2001, Ms. Natzel entrusted respondent with a cashier's check in the amount of $55,359.80, representing the money she had received from a title company after remortgaging her home. Respondent then wrote to opposing counsel, advising that his client had provided him with $32,000 as a "good faith gesture for her offer" to settle the sanctions award for that amount. Respondent also advised the defendants' counsel that Ms. Natzel was prepared to file a voluntary bankruptcy petition. These particulars of respondent's representation of Ms. Natzel, along with a chronology of his actions in Ms. Natzel's matter through March 2003 are described in detail in the 46 numbered paragraphs which comprise the "general allegations" in the complaint. The charges of misconduct in this case are described with more specificity in Counts One through Three of the complaint.

Count One charged that respondent's failure to communicate adequately with his client included his failure to advise her that she had been scheduled for a creditor's examination in May 2001; failed to advise that the defendants had filed a motion requesting that she be held in contempt for failing to appear; and failed to advise that he filed an incomplete bankruptcy petition on her behalf for no other reason than to delay the circuit court proceedings. Count One also charged that he falsely advised opposing counsel, and the court, that his client had provided him with only $32,000 and that she would need to pay the remainder of the judgment in monthly installments; that he falsely advised opposing counsel that he had received a $1,000 from his client each month from March 2002 through November 2002 which he was forwarding as her "monthly installment

payment" and that he falsely advised Ms. Natzel's new attorney, in January 2003, that his client had been aware of his actions, including the disbursement of installment payments to the defendants.

Count Two of the complaint charged that, contrary to his duties under Michigan Rule of Professional Conduct 1.15 to maintain his client funds in a separate account, respondent deposited the cashier's check of $55,359.80 which he received from Ms. Natzel into his business checking account, thus commingling his client's funds with his personal funds. That count charged further that respondent misappropriated his client's funds.

Count Three of the complaint involved respondent's sworn testimony in April 2004 when he was subpoenaed to appear at the Attorney Grievance Commission to provide information regarding the allegations raised by Ms. Natzel in her request for investigation filed in early 2003. Specifically, Count Three charged that respondent gave false testimony to representatives of the Attorney Grievance Commission when he stated under oath that a portion of Ms. Natzel's funds were maintained in his general account from May 2001 until March 2002 and that a portion of the funds had been withdrawn and were maintained, in cash, in a safe at his office.

Respondent failed to file an answer to the complaint and his default was entered. He submitted no pleadings or correspondence to the hearing panel or the Attorney Discipline Board prior to the scheduled hearing, but did appear before Genesee County Hearing Panel #3 for the hearing on January 25, 2005.

At the commencement of the hearing, respondent acknowledged notice of the proceeding. He was asked by the panel on what basis he was making his oral motion to set aside the default:

> Respondent: Well the reason I didn't answer it, I basically didn't answer because most of the allegations would be admitted in the answer. But I, in talking with Ms. Neeley this morning, I just figured that, you know, if I am just going to admit all of them, there is no sense filing an answer. But she is now telling me that I don't get to participate. And I didn't realize that was the - - the extent of not filing the answer, was to have not be able to participate in the hearing. (Tr 6-7.)

On further questioning, respondent stated to the panel that he was admitting the charges in Counts One and Two of the complaint but "probably would deny Count Three." (Tr 8.) Following a short recess, the hearing panel returned to announce that respondent's oral motion to set aside default was denied; that the misconduct charged in the complaint was established by virtue of the

default and that the panel was prepared to proceed with the separate hearing on discipline. The Administrator's counsel had no exhibits to offer in support of aggravating factors to be considered by the panel. Likewise, respondent had no exhibits in support of mitigating factors. However, respondent did testify on his own behalf regarding the level of discipline. Using the list of mitigating factors recognized in Standard 9.32 of the ABA Standards, respondent asked the panel to consider the following factors in mitigation:

Standard 9.32(a) - absence of a prior disciplinary record;

Standard 9.32(b) - absence of a dishonest or selfish motive - respondent acknowledged to the panel that his client gave him $55,000.00 to be used to discharge her sanction obligation. He told the panel:

> "And when she did, I don't deal with client funds. I don't have a trust account. And I put them in my regular account."
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> "Unfortunately, I was having a little financial problem right at the time, and I did spend some of the money that she had given me on, you know, my own personal things and some of the things to keep my office running."
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> . . .
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> "In the end as I said, I never had any intent or dishonesty to taking her money. And in the end I paid all of the money back to her . . ." (Tr 20.)

Standard 9.32(d) - timely good faith effort to make restitution - respondent noted that he had paid the misappropriated funds back to Ms. Natzel;

Standard 9.32(e) - full and free disclosure to disciplinary authorities - respondent noted to the panel that he appeared, pursuant to a subpoena for a sworn statement, at the Attorney Grievance Commission and that he brought his files and records with him; [He did not address the charges in Count Three that he made false statements in his testimony at the Grievance Commission]

Standard 9.32(g) - character or reputation - respondent stated that he has a good reputation among attorneys who do bankruptcy work;

Standard 9.32(l) - remorse - respondent testified to the panel "I've been - this has killed me. You know, did I do something wrong? Yes, I did. And its killed me." (Tr 23.)

On cross-examination, the Administrator's counsel clarified certain points. Specifically, respondent admitted that he deposited over $55,000 in client funds into his business account in May 2001 and that those funds were completely depleted by December 2001.

In closing arguments, the Administrator's counsel presented an analysis under the ABA Standards, noting that several Standards for disbarment were applicable in this case, including ABA Standard 4.11[knowing conversion of client property]; Standard 4.61 [knowingly deceiving a client]; Standard 5.11(a) [intentional dishonesty, fraud, deceit or misrepresentation]; and Standard 6.11 [submission of a false statement or false document to a court]. Counsel also called the panel's attention to Grievance Administrator v Frederick Petz, ADB 99-102-GA (2001), in which the Board held that, upon proper application of the ABA Standards, an attorney's knowing misappropriation of client funds, absent compelling mitigation, is generally grounds for disbarment.

On May 2, 2005, the hearing panel issued its order directing the suspension of respondent's license to practice law for 30 months. In the accompanying report, the panel distinguished Mr. Matheny's situation from that presented in Grievance Administrator v Petz, supra. The panel noted, in particular, a lack of injury to the complainant since restitution was ultimately made to Ms. Natzel; respondent's relative inexperience as a lawyer; and its conclusion that "although respondent acted intentionally with what he did, it was closer to a negligent act than the type of action that might be considered more willful."

Discussion

This matter having come before the Board for review proceedings under MCR 9.118, the Board is presented with two questions:

1. Should the Board reduce discipline in this case from 30 months to a suspension of 179 days or less?
2. Should the Board increase discipline in this case to disbarment?

A. Respondent's Request for Reduced Discipline

The grounds upon which respondent seeks a reduction in the level of discipline are set forth in his brief filed June 17, 2005. We first address the Grievance Administrator's objections to that portion of respondent's brief (pp 2-8) entitled "Facts." Specifically, the Administrator has argued that, for the most part, the "facts" recited in respondent's brief, as well as an attached letter from respondent to the Grievance Administrator's counsel in April 2003, appear nowhere in the record below and are therefore improper. The Grievance Administrator's objection has merit.

The Attorney Discipline Board's order to show cause setting this matter for argument and establishing a briefing schedule was accompanied by an instruction sheet stating that a brief filed in support of a petition for review "**MUST**" [emphasis in original] contain, among other things:

> b. A statement or counterstatement of facts that must be [a] clear, concise and chronological narrative. All material facts, both favorable and unfavorable, must be fairly stated without argument or bias. The statement must contain, with specific page references to the record, a summary of the evidence, hearing panel decisions, and other such matters necessary to an understanding of the controversy and the questions involved; [Emphasis in original.]

This instruction employs the language found in MCR 7.212(C)(6) that describes the contents of an appellate brief in a civil proceeding.

Page references to the record in respondent's brief are absent and, as the Administrator points out in reply, the undisputed factual record in this matter is contained in paragraphs 4 through 46 of the formal complaint which were established by respondent's default. We agree with the Grievance Administrator that, having ignored his obligation under the rules to file an answer to the formal complaint and having voluntarily waived his opportunity to present evidence, respondent should not now be allowed to present to the Board a chronological narrative of events, conversations, inferences and impressions that do not appear in the record.

While the version of the facts presented in respondent's brief attempts to describe his actions, especially his communications with his client, the court and other attorneys, in the best possible light, this recitation of facts omits any meaningful reference to the misconduct that lies at the heart of this case. Respondent was entrusted with over $55,000 that did not belong to him. He was expected by his client to use those funds to resolve her obligation to pay sanctions and costs. However, he did not segregate those funds from his own, but commingled his client's money with his own funds in his business account. Of particular significance is respondent's testimony that he

was having a "little financial problem" when he took possession of those funds and so he spent some of the money on "[his] own personal things and some of the things to keep [his] office running." (Tr 20.)

The record before the panel dispels any doubt as to the extent of respondent's misappropriation:

> AGC Counsel: Mr. Matheny, I want to get back to some of the issues regarding restitution. You indicated that when it was requested of you, you paid back Ms. Natzel the funds that she had provided to you, is that correct?
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> Respondent. That is correct.
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> Q. Ok. Isn't it true, though, that the actual funds that she gave to you that you deposited into your account in May of 2001, those funds were completely depleted as of December 2001 from that account?
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> A. From the account, yes, they were.
>
> Q. Okay. And that when you paid Ms. Natzel back , it was not from the funds that she had initially provided you?
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> A. No it was not. It was from my own funds.
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> Q. Okay. So, in fact, the entire amount that she provided to you, the entire $55,000 was in fact misappropriated?
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> A. Yes. (Tr 24.)

Respondent now argues on appeal to the Board that:

> In this case the real misconduct occurred when Mr. Matheny put the $55,359.80 in his office account instead of opening a trust account. He had never had the need for a trust account and had a serious lapse in judgment. (Respondent's Brief, p 13.)

A similar argument with regard to the commingling aspect of respondent's misconduct was presented to the Board in Grievance Administrator v Robert R. Cummins, ADB 159-88 (1988). In that case, respondent, who normally represented defendants in Workers' Compensation cases, admitted that when he received a $3,600.00 settlement check on behalf of a plaintiff in a claim against the city of Detroit, he did not have a client trust account so he deposited the check in his office account. On that issue, the Board said:

> There should be no question as to the nature of the misconduct in this case. We can perceive of no excuse for an attorney's failure to be

> aware of the requirement under Rule 1.15 of the Michigan Rules of Professional Conduct [formerly DR 9102(a)] that client funds be held separately from the lawyer's own money. There are no exceptions in either the former or present rule which would allow an attorney to commingle client funds in a business or personal account for reasons of convenience or expedience.
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> . . .
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> The rule prohibiting the commingling of client funds with the funds of an attorney is not subject to a defense based upon accounting error nor is the amount of money involved significant in determining whether the rule has been violated. The rule is designed to ensure against any invasion of client funds, whether careless or intentional. Cummins, supra at p 2.

We have cited the importance of maintaining public confidence in the legal profession as a repository of client funds by strict adherence to the rule requiring segregation of client and attorney funds:

> When client funds have been commingled with the attorney's funds and then spent, whether by mistake or design, some attorneys will be in a position to rectify the situation. Some, unfortunately, will not. The client entrusting funds to an attorney's care should not have to gamble on that attorney's future financial well being. Compliance with MRPC 1.15 assures that regardless of the attorney's personal financial situation, the client's money will remain intact and inviolate in a segregated account. As the Illinois Supreme Court stated: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate . . ." In re Bizar, 97 Il2nd 127; 454 NE2nd 271 (1983). Grievance Administrator v Debra C. Lynch, ADB 96-96-GA (1997).

While there is no question in this case that respondent committed professional misconduct when he placed client funds in his office account, it is also clear that the "real misconduct" occurred not when the funds went into his office account, but when respondent spent that money to discharge his own personal and business obligations.

Respondent's improper placement of client funds in his business account, standing alone, would, in the absence of aggravating or mitigating factors, be expected to result in a suspension under ABA Standard 4.12, that states that suspension is generally appropriate when a lawyer knows or should have known that he is dealing improperly with client property and causes injury or potential injury to a client. For the reasons described above in such cases as Cummins and Lynch,

respondent knew or should have known that he had a duty to segregate his client funds and we have explained in those opinions why the failure to do so invites potential harm to clients.

In the presence of significant mitigating factors, a single instance of commingling has resulted in the imposition of a reprimand. In the case of Robert Cummins, supra, for example, the Board reduced a 30 day suspension to a reprimand under the unusual circumstances presented in that case.[1] That is simply not the case presented here. Respondent does not claim that his withdrawal of funds belonging to his client between May and December 2001 was an oversight or accounting error. Rather, his explanation to the panel was straightforward,

> Unfortunately, I was having a little financial problem right at the time, and I did spend some of the money that she had given me on, you know, my own personal things and some of the things to keep my office running. (Tr 20.)

By his own admission, therefore, it is clear that the respondent in this case did not engage in a technical misappropriation nor did he misuse client funds as the result of poor office practices. When a bank teller, public official or church secretary spends someone else's money because of "a little financial problem," that behavior is commonly described as embezzlement. To be more blunt, the taking and spending of money that belongs to someone else is commonly described as theft. By whatever terms it is known, such intentional conduct by an attorney has long been viewed as one that inevitably damages confidence in the legal profession. In an opinion often cited in such cases, the Supreme Court of New Jersey observed that banks do not rehire tellers who have embezzled funds and that the standards of the legal profession should be at least that high. Matter of Wendell B. Wilson, 81 NJ 451; 409 A2d 1153 (1997).

In her arguments to the panel, the Administrator's counsel properly cited our opinion in Grievance Administrator v Frederick A. Petz, ADB 99-102-GA (ADB 2001). Notwithstanding earlier Board opinions referring to a "range" of discipline in such cases of three years suspension to disbarment, the Petz case was decided after the Supreme Court's adoption in Grievance

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[1] In GA v Robert Cummins, supra, the evidence established that, after depositing the settlement check in his business account, that respondent left for a vacation to Florida where he was hospitalized after contracting pneumonia, thus delaying his return to Michigan. During his absence, his client was unable to contact him when the check for her share of the settlement was dishonored by the bank. Respondent established that bank charges, among other things, had caused the balance of the account to fall $17.40 below the amount due to his client but that the shortfall could legitimately be described as an accounting error on his part.

Administrator v Lopatin, 462 Mich 235 (2000) of the American Bar Association's Standards for Imposing Lawyer Sanctions. In our July 2001 opinion in Petz, we concluded:

> With our opinion today, we serve notice that hearing panels presented with facts similar to those in the instant case, that is, intentional conversion of client funds for the lawyer's personal or business use coupled with the absence of compelling mitigation are, until further order of the Attorney Discipline Board or the Supreme Court, to apply the American Bar Association's Standards for Imposing Lawyer Sanctions and, if appropriate, to explain why the presumptive sanction of disbarment under Standard 4.11 should not be applied. [Petz, supra, pp 10-11.]

Unlike the panel below, we are unable to distinguish this case to any significant degree from Petz. Given the nature of respondent's conduct, especially the continuing misuse of client funds over a period of time and what appears to us to be respondent's calculated efforts to conceal his use of his client's funds, we do not agree that respondent's relative inexperience in the practice of law, his remorse or his eventual repayment of the money constitute compelling mitigation. To the contrary, our review of the chronology of events set forth in the complaint suggests to us that respondent disbursed funds or provided information only when his continuing deception could no longer be concealed.

We note further, for example, that respondent made restitution, by way of a cashier's check, to his client's new attorney on January 21, 2003. Respondent's cashier's check in the amount of $15,259 represented a portion of the $55,359.80 entrusted to him in May 2001 and deposited in a business account that, he admitted, was entirely depleted by December 2001. While it is true that on January 21, 2003, respondent had not yet received Ms. Natzel's request for investigation, the record also discloses that her new attorney wrote to respondent on January 13, 2003 asking what he had done with the $55,359.80. In short, respondent's repayment of his client's money, a year after its misuse and then only after a request for an accounting, did not constitute a "timely good faith effort to make restitution" within the meaning of ABA Standard 9.32(d) [factors which may be considered in mitigation]. Respondent's repayment to his client is more properly described as forced or compelled restitution as described in ABA Standard 9.4(a) and is thus a factor which should generally not be considered as either aggravating or mitigating.

Finally, while we have focused on respondent's intentional conversion of funds entrusted to him by a client, we cannot overlook respondent's misrepresentations to an opposing counsel and to the Grievance Administrator as described in Counts One and Three of the formal complaint.

For all of these reasons, respondent's request for a reduction in discipline from a suspension of 30 months to a suspension of 179 days or less cannot warrant serious consideration.

B. Our Decision to Increase Discipline

As noted above, the Grievance Administrator filed a timely petition for review on May 17, 2005 on the grounds that the hearing panel had imposed insufficient discipline. The petition for review stated that it was filed on a conditional basis and was subject to approval by the Attorney Grievance Commission at its monthly meeting then scheduled for May 25, 2005.[2] Respondent's petition for review was filed May 20, 2005.

On June 14, 2005, the Administrator's counsel advised the Board in writing that on May 25, 2005 the Attorney Grievance Commission had denied approval of the Administrator's petition for review and had denied the Administrator's request for reconsideration of that decision at a meeting of the Commission on June 13, 2005. Consequently, counsel requested that the Administrator's petition for review be dismissed.

A review of prior opinions of the Attorney Discipline Board discloses that the Board has rarely, if ever, increased the level of discipline in the absence of a petition for review requesting such action by the Grievance Administrator or, conversely, reduced the level of discipline in the absence of a petition for review filed by respondent. Indeed, there are valid policy considerations which would generally discourage such an action.

The actions which may be taken by the Attorney Discipline Board following a review hearing conducted under MCR 9.118 are described in Rule 9.118(D). That rule states that the Board "may affirm, amend, reverse or nullify the order of the hearing panel in whole or in part or order other discipline." When read in conjunction with the admonition of Rule 9.102(A) that these rules of disciplinary procedure are to be "liberally construed for the protection of the public, the courts and the legal profession," we have no doubt that our decision to increase discipline in this case is both warranted and authorized under the rules. Unlike a civil matter in which a party struggles to

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[2] Under MCR 9.109(B)(7), the enumerated powers and duties of the Grievance Administrator include the ability to "prosecute or defend reviews and appeals as the commission authorizes."

emerge as the winner, or to avoid leaving the field of battle as a loser, the Board's function as explicated by the Court in subchapter 9.100 is not to declare winners or losers but to assure to the extent possible, that these discipline proceedings advance the overriding goals of protecting the public, the courts and the legal profession.

In this case, the Board has unanimously reached the firm conclusion that discipline less than revocation case would not advance those goals. We therefore exercise the authority described in Rule 9.118(D) by vacating the order of the hearing panel by ordering the revocation of respondent's license to practice law.

Board members Theodore J. St. Antoine, William P. Hampton, Marie E. Martell, Ronald L. Steffens, Rev. Ira Combs, Jr., George H. Lennon, Billy Ben Baumann, M.D., and Lori McAllister concur in this decision.

Board member Hon. Richard F. Suhrheinrich did not participate in this decision.